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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEVIN LEE BRYANT, Defendant and Appellant.	D074040 (Super. Ct. Nos. INF1200501, SWF1500678)

APPEALS from judgments of the Superior Court of Riverside County, Charles E. Stafford, Jr., Graham A. Cribbs, and Alfonso Fernandez, Judges. Affirmed in part; reversed in part with directions.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Kevin Lee Bryant of two counts of premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664)[1] and one count each of assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)), corporal injury to a spouse (§ 273.5, subd. (a)), and false imprisonment by violence or menace (§ 236). As to certain offenses, the jury found that Bryant personally inflicted great bodily injury on the victim under circumstances of domestic violence. (§ 12022.7, subd. (e).) In bifurcated proceedings, the jury found that Bryant was sane during the commission of the offenses. It also found that Bryant had suffered a prior serious felony conviction. (§ 667, subds. (a), (c).) In this case (No. INF1200501), the trial court sentenced Bryant to a total term of 43 years to life imprisonment.

A second jury convicted Bryant of three counts of resisting an executive officer with force or violence. (§ 69.) In this case (No. SWF1500678), the court sentenced him to a total term of two years, to be served concurrently with the prior sentence.

Bryant appeals both judgments. In his initial briefing on appeal, he contended the trial court erred by (1) denying his two requests to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) and (2) refusing to stay one of his sentences for premeditated attempted murder under section 654. We rejected those contentions in an unpublished opinion and affirmed the judgments. (*People v. Bryant* (Aug. 1, 2018, D074040).) After the California Supreme Court denied review (*People v. Bryant*

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1 Further statutory references are to the Penal Code unless otherwise stated.

(Aug. 1, 2018, D074040) review denied Oct. 31, 2018, S251033), we issued our remittitur on November 2, 2018.

Approximately two weeks later, Bryant filed a motion to recall the remittitur and permit supplemental briefing regarding Senate Bill No. 1393, which removed the statutory prohibition on striking Bryant's five-year prior serious felony enhancements under sections 667, subdivision (a) and 1385. The Attorney General did not oppose the motion, which we granted. In supplemental briefing, the Attorney General concedes Bryant is entitled to the benefit of the new statute. We accept this concession, reverse the relevant judgment, and remand with directions to resentence Bryant. Our discussion of Bryant's previous contentions remains unchanged.

FACTS

For purposes of this section, we state the evidence in the light most favorable to the judgments. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts will be discussed where relevant in the following section.

The victim worked as a caregiver at a small group home for high-functioning mentally-disabled adults in Desert Hot Springs, California. She lived in a room at the home with Bryant, whom she had married approximately three months before the offenses. Their room had an adjoining bathroom.

On March 19, 2012, Bryant arrived back at the home and rang the bell. The victim went to open the door, but she heard someone else do it. Bryant confronted the victim and asked her why she did not open the door for him. The victim explained that

someone had already opened it. Bryant responded by slapping her. When the victim started crying, Bryant told her to stop or he would kill her. The victim continued to cry, so Bryant started choking her. She could not breathe and eventually lost consciousness.

When she awoke, Bryant turned to her and asked, "You are still alive?" He started to choke her again, but someone knocked on their door. Bryant stopped, opened the door, and briefly talked with the person. In an effort to get away, the victim asked to go to the bathroom. After initially resisting, Bryant allowed the victim to sit on the toilet while he watched. After a few minutes, Bryant became impatient and told the victim to hurry up or he would kill her. The phone rang, which Bryant answered and hung up, and then Bryant began choking the victim again.

The phone rang again, and the victim was able to answer it. It was a friend of the victim. The victim told her friend to come over under the pretext of fixing her phone. The victim told Bryant she needed to give one of the residents his clothes. After some back-and-forth, Bryant allowed the victim to go help the resident retrieve his clothes from the home's garage. The victim went to the resident's room, asked him to follow her, and went with the resident to the garage. Bryant followed them the whole time.

The victim opened the garage and let the resident retrieve his clothes. After the resident left, Bryant tried to convince the victim to go back to their room. When the victim refused, Bryant picked her up and carried her into the garage. He began to choke her again, but then he picked up a large black rock. Bryant told the victim, "It's okay, baby. It is almost over." He set the rock down and continued to choke her. The victim

could not breathe, and her body went numb. Her hands and feet started shaking, and she lost consciousness.

At that point, a car honked its horn outside. The victim regained consciousness and ran toward the door of the garage. The victim was able to go outside and meet a delivery person. She told the delivery person about the assault and asked him to drive her away. He said he was busy and refused. But he did call the administrator of the group home. The victim waited in the driveway of the home, with Bryant by her side. Eventually the victim's friend arrived, as did the administrator and owner of the home. They noticed the victim's injuries and called police.

While Bryant was in custody awaiting trial, a sheriff's deputy asked him to remove something white from his ear. Bryant refused. When the deputy attempted to remove the object, Bryant shoved the deputy. The deputy and several others wrestled Bryant to the ground as he continued to resist. Three deputies suffered injuries as a result of the encounter.

DISCUSSION

I

Self-Representation

Bryant contends the trial court erred by denying his two requests to represent himself under *Faretta, supra*, 422 U.S. 806. Both requests occurred in the context of hearings to replace appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We will discuss these hearings and their context in some detail below. We

will then conclude that Bryant abandoned his first request for self-representation, and that his second request was untimely and thus properly denied.

A. *Additional Background*

Bryant's first request to represent himself occurred during a *Marsden* hearing in September 2015. At the outset of the hearing, the court confirmed with Bryant that he was making a *Marsden* motion. Bryant agreed and added, "Also a *Faretta* motion too." After discussing some preliminary matters with defense counsel, the court asked Bryant to explain why he wanted to have new counsel appointed. Bryant said that his counsel had not provided him with case-related materials he requested, had not followed up on medical issues at the jail, and had not contacted various third parties on his behalf. In the course of his explanation, Bryant stated, "He just wants to proceed with the case, and I'm not ready to proceed with the case. Because I'd really like to represent myself, that way I can have my investigator do things. I can get all the paperwork. I [would] have . . . court law books, and everything, pretty much everything that you know I would be able to learn myself." The court then asked Bryant why he wanted to represent himself. Bryant said he was great at reading comprehension. He would be able to read and "gain knowledge about more court etiquette and things I can do to help represent myself." Defense counsel explained that, as far as the *Marsden* motion was concerned, Bryant had essentially "shut down" on him. He recommended that if a new attorney were appointed, he or she could discuss Bryant's desire to represent himself and offer advice on that issue.

The court stated that it was treating Bryant's request "as a simple *Marsden* motion." It granted that motion based on Bryant's unwillingness to work with his

counsel. It explained, "The Court makes no finding whatsoever with regard to entertaining a *Faretta* motion at this time. That's premature in my personal opinion. That's left for another day, assuming that day comes." Bryant asked, "Isn't it my Sixth Amendment right to be able to have a *Faretta* motion?" The court stated, "In light of the fact that the Court granted your *Marsden* motion and that obviously was the triggering event for what it is we deal with here, I'm simply assuming for the moment that you no longer could work with [your counsel] and communicate with him such that the two of you jointly could work out a proper defense with regard to your case. [¶] That being said, I'm not making any ruling with regard or even entertaining the *Faretta* motion at this time. If that truly is something that you want to engage in in the future, that's your business with new counsel, but, first, we're going to go the route that I've just set forth." Bryant responded, "Thank you."

The court appointed new counsel for Bryant. Over the next five months, the court held a number of trial readiness conferences. In March 2016, defense counsel expressed doubt as to Bryant's mental competency and the court suspended the criminal proceedings. Almost four months later, the court found Bryant to be competent and reinstated the proceedings. His counsel, however, declared a conflict and was relieved.

In July 2016, the court appointed new counsel for Bryant again. The court held several trial readiness conferences over two months, until a trial date was set. The defense requested a continuance, which was granted. At a further hearing, defense counsel again expressed doubt as to Bryant's mental competency. The court deferred

ruling on the request and eventually determined there had been no change in circumstances that would warrant a competency inquiry.

Bryant's second request to represent himself occurred in November 2016, when the matter was assigned a courtroom for Bryant's first jury trial. Once the parties arrived, the court announced it had been informed that Bryant wanted a *Marsden* hearing. At the hearing, Bryant explained that his attorney had not provided him with "documents, things from the Internet to continue my case, things from witnesses, and things like that." He said, "I was hoping to maybe go pro per so I could help myself more by getting to know the law a little bit better so I could represent myself." The court asked whether Bryant could move forward on that day if he represented himself, and Bryant said he could not. After discussing his counsel's performance in more depth, the court denied the *Marsden* motion. It then addressed Bryant's request to represent himself. Referencing Bryant's plea of not guilty by reason of insanity and the type of requests he had made for discovery, the court told Bryant he should not be representing himself. When Bryant objected, the court said it was denying Bryant's request because he was not prepared to proceed and because he had pleaded not guilty by reason of insanity.

B. *Analysis*

"A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. [Citations.] 'A trial court must grant a defendant's request for self-representation if the defendant knowingly and intelligently makes an unequivocal and timely request after having been apprised of its dangers.' [Citation.] Erroneous denial of a *Faretta* motion is reversible per se." (*People v.*

Williams (2013) 58 Cal.4th 197, 252-253.) "In determining on appeal whether the defendant invoked the right to self-representation, we examine the entire record de novo." (*People v. Dent* (2003) 30 Cal.4th 213, 218 (*Dent*).)

"It is settled that the *Faretta* right may be waived by failure to make a timely request to act as one's own counsel [citation], or by abandonment and acquiescence in representation by counsel [citations]. The court may deny a request for self-representation that is equivocal, made in passing anger or frustration, or intended to delay or disrupt the proceedings. [Citation.] A defendant may be mentally incompetent to waive counsel. [Citation.] And in [*Indiana v. Edwards* (2008) 554 U.S. 164, 178-179], the high court recently decided that 'the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.' " (*People v. Butler* (2009) 47 Cal.4th 814, 825 (*Butler*).) "The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such waiver." (*People v. Dunkle* (2005) 36 Cal.4th 861, 908 (*Dunkle*).)

"[I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*).) "Once trial has commenced, the trial court has discretion to deny a request for self-representation. '[O]nce a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he

be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court.' " (*People v. Jackson* (2009) 45 Cal.4th 662, 689; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1365 (*Bradford*) ["When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion."].)[2]

Bryant argues the court erred by denying his first request for self-representation because it was timely and unequivocal. We need not decide whether Bryant's first request was unequivocal because we conclude he abandoned the request. As noted, a self-representation request may be waived "by abandonment and acquiescence in representation by counsel." (*Butler*, *supra*, 47 Cal.4th at p. 825; accord, *Dunkle*, *supra*, 36 Cal.4th at p. 909 ["[T]he *Faretta* right, once asserted, may be waived or abandoned."].) "A defendant's waiver or abandonment of this constitutional right should be voluntary, knowing, and intelligent [citation]; such waiver or abandonment may be inferred from a defendant's conduct." (*People v. Trujeque* (2015) 61 Cal.4th 227, 262-263.)

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2 In assessing an untimely self-representation request, the trial court considers such factors as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Windham*, *supra*, 19 Cal.3d at p. 128.) These are not the exclusive factors a trial court may consider in evaluating an untimely self-representation request (*Bradford*, *supra*, 15 Cal.4th at pp. 1354-1355), and the court is not required to expressly cite each factor in making its ruling. (See, e.g., *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206 ["[W]hile the trial court may not have explicitly considered each of the *Windham* factors, there were sufficient reasons on the record to constitute an implicit consideration of these factors".].)

"The standard for waiving the right to self-representation is substantially less stringent than it is for waiving the right to counsel. . . . That right may be waived expressly or impliedly through conduct that is inconsistent with the assertion of the right." (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 104.) A defendant's acquiescence to representation after making a self-representation request is a factor that may support a finding of abandonment. (See *McKaskle v. Wiggins* (1984) 465 U.S. 168, 182-183.) For example, where a trial court does not rule on a self-representation request, and the defendant fails to request a ruling or raise the issue again, he may be held to have abandoned his request through "his silent acceptance of defense counsel's assistance for the remainder of the proceedings." (*People v. Skaggs* (1996) 44 Cal.App.4th 1, 8 (*Skaggs*); accord, *People v. Kenner* (1990) 223 Cal.App.3d 56, 62 (*Kenner*) ["[W]here appellant had both time and opportunity to follow up on his request for a hearing on his *Faretta* motion, and failed to do so, he must be deemed to have abandoned or withdrawn that motion."].)

Here, like in *Skaggs* and *Kenner*, the trial court did not rule on Bryant's request to represent himself. Instead, the court explicitly invited Bryant to raise the issue in the future after new counsel was appointed. Bryant responded, "Thank you." After that hearing, Bryant appeared at numerous trial readiness conferences represented by his new attorney. The record does not reflect that Bryant raised the issue of self-representation with the court during that time, despite having the wherewithal to address the court at one hearing to complain about the lengthy delays in his case. When that attorney expressed doubt about Bryant's mental competency, and the court subsequently found Bryant

competent, the court appointed another new attorney. The record does not reflect that Bryant objected to this new appointment or did anything other than accept his representation. Under these circumstances, we conclude Bryant knowingly, voluntarily, and intelligently acquiesced in his representation by counsel and abandoned his prior request for self-representation. (See *Skaggs*, *supra*, 44 Cal.App.4th at p. 8; *Kenner*, *supra*, 223 Cal.App.3d at p. 62; see also *People v. Tena* (2007) 156 Cal.App.4th 598, 610-612.)

When Bryant did raise the issue of self-representation for the second time, it was after his case had been sent to a courtroom for trial and jury selection was about to begin. At that point, his request—whether interpreted as a new request or a renewed request—was untimely. (See *People v. Valdez* (2004) 32 Cal.4th 73, 102 ["We conclude that defendant's motion was untimely. Defendant asserted his right to self-representation moments before jury selection was set to begin."]; see also *People v. Hill* (1983) 148 Cal.App.3d 744, 757; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791.) The record is sufficient to allow us to conclude the court properly exercised its discretion to deny Bryant's request. Given the length of time that had elapsed since he had been charged, the stage of the proceedings, and the fact that he could not proceed with the trial as scheduled if he were to represent himself, Bryant has not shown the court abused its discretion by denying his second request for self-representation. (See *Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5 [the decision whether to grant or deny a *Faretta* request "is addressed to the sound discretion of the trial court" and "a defendant should not be

allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice."].)

In sum, Bryant has not shown the trial court erred because (1) his first *Faretta* request, even assuming it was unequivocal, was abandoned; and (2) his second *Faretta* request, made on the eve of jury selection without reasonable cause for its lateness, was untimely.

II

Section 654

Bryant contends the court erred by not staying one of his sentences for premeditated attempted murder under section 654. In his closing argument, the prosecutor identified the basis for the first attempted murder charge as the attack in the back bedroom and the second as the attack in the garage. At sentencing following Bryant's conviction, his counsel argued that section 654 should apply to stay one of his sentences for attempted murder. The prosecutor opposed. He argued that section 654 could not apply because the two counts consisted of the same offense, rather than different offenses, and because they arise from different operative sets of facts that were distinct. The trial court agreed that section 654 did not apply. It stated, "The defendant committed two separate wrongful acts in Counts 1 and 2. I agree with the position of the district attorney, they were two separate acts, and they were separated in time and in location as well."

Section 654 provides, in relevant part, as follows: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) "On appeal, we review factual determinations under the deferential substantial evidence test, viewing the evidence in the light most favorable to the People. [Citation.] We review de novo the legal question of whether section 654 applies." (*People v. Valli* (2010) 187 Cal.App.4th 786, 794.)

"The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).)

" 'It is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.' [Citation.] ' "The defendant's intent and objectives are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced." ' " (*People v. Capistrano* (2014) 59 Cal.4th 830, 886 (*Capistrano*).)

Although the defendant must form a separate intent and objective for each offense, these separate intents and objectives may be the same in substance. "It seems clear that a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639,

fn. 11.) "Under section 654, a course of conduct divisible in time, though directed to one objective, may give rise to multiple convictions and multiple punishment 'where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken.' " (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717-718; accord, *People v. Deegan* (2016) 247 Cal.App.4th 532, 542.)

This principle applies whether the defendant is charged with different substantive offenses or the same substantive offense multiple times. "[N]o special treatment is to be afforded to a defendant under section 654 simply because he chose to repeat, rather than to diversify or alternate, his many crimes." (*Harrison, supra*, 48 Cal.3d at p. 337.) For example, in *People v. Trotter* (1992) 7 Cal.App.4th 363, 366 (*Trotter*), the court considered whether separate sentences could be imposed for two of three assaults, which were each based on a separate shot fired by the defendant at a pursuing police officer. The defendant argued that "each shot manifested the same intent and criminal objective, which was to force [the police officer] to break off his pursuit." (*Id*. at p. 367.) *Trotter* disagreed. It held that the objectives and intents underlying each shot, even though the same in substance, were separate and distinct. (*Ibid*.) The court explained, "[T]his was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. 'Defendant should . . . not be rewarded where, instead of

taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.' " (*Id*. at p. 368.)

Similarly, here, Bryant's two convictions resulted from two physical acts, separated by time and place. Each one required Bryant to decide to choke the victim. The trial court could reasonably find that Bryant formed two separate intents to murder the victim, first in their bedroom and then later in the group home's garage. The two attempts were divisible in time, since after the first attempt the victim was able to talk with a resident, walk to the garage, and let the resident pick up his clothes before Bryant attacked her again. The two attempts were also divisible physically, since the first occurred in their bedroom and the second in the home's garage. The temporal and physical separation of the attempts was such that Bryant had an opportunity to reflect and renew his intent after the first attempted murder before committing the second attempted murder. It is therefore appropriate, and commensurate with his culpability, to punish him separately for the two attempts. The evidence supports the trial court's determination that section 654 did not prohibit multiple punishments under the circumstances here.

Bryant argues that the two attempts should not be punished separately because he was "in uninterrupted physical control" over the victim throughout the two attempts. Bryant cites no authority supporting this argument, and we are aware of none. The concept of physical control does not serve to connect two otherwise divisible acts. In *Harrison*, for example, the Supreme Court held that a series of sexual offenses could be punished separately notwithstanding the fact they were inflicted on the victim in a single, continuous violent encounter. (*Harrison*, *supra*, 48 Cal.3d at pp. 325-326.) Similarly,

here, the fact that Bryant exerted control over his victim at various points during their encounter does not transform each distinct attempted murder into a single, indivisible offense within the meaning of section 654. Section 654 does not preclude separate punishment for each distinct attempted murder here.

In another effort to invoke section 654, Bryant contends that his attempted murder of the victim was not "completed" until the second attack ended. We disagree. "Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Bryant completed the offense of attempted murder each time he took such a direct act toward killing the victim with the required intent. The offense did not continue, as one indivisible offense, until his attempts to kill her finally stopped and did not recur. Contrary to Bryant's claim, the fact that attempted murder is an "inchoate" offense simply means that the *intended* offense has not been completed, not that *no* offense has been completed.

Bryant also contends the court misunderstood its "discretion" when considering whether to stay Bryant's second attempted murder sentence under section 654. As an initial matter, we disagree with Bryant's claim that the determination under section 654 is a discretionary matter for the trial court. The statute simply prohibits multiple punishment under certain factual circumstances. It requires a factual finding, not a discretionary determination, regarding the intent and objective of the defendant. (See *Capistrano*, *supra*, 59 Cal.4th at p. 886.) Moreover, Bryant's contention relies on an alleged misstatement of law by the prosecutor, not by the court. He has cited no authority

for the proposition that a ruling must be reversed because one of the parties misstated the law in its argument. Instead, the law is directly the opposite: "In the absence of evidence to the contrary, we presume that the court 'knows and applies the correct statutory and case law.' " (*People v. Thomas* (2011) 52 Cal.4th 336, 361.) Although not necessary, the presumption here is confirmed by the trial court's own remarks, which referenced the fact that there were "two separate wrongful acts" that were "separated in time and in location." Bryant has not shown the court misapplied the law or otherwise erred by not staying Bryant's second attempted murder sentence under section 654.

III

Prior Serious Felony Enhancements

As noted, the Legislature recently enacted Senate Bill No. 1393, which removed the statutory prohibition on striking a five-year prior serious felony enhancement under sections 667, subdivision (a) and 1385. (Stats. 2018, ch. 1013, §§ 1-2.) It became effective on January 1, 2019. (See Cal. Const., art. IV, § 8, subd. (c)(1); Gov. Code, § 9600, subd. (a).)

In his motion to recall the remittitur and subsequent briefing, Bryant contends Senate Bill No. 1393 should be applied retroactively to this matter under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). Under the particular procedural circumstances of this case, the Attorney General agrees. We accept this concession.

Under *Estrada*, courts will infer that "in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final

and sentences that are not." (*People v. Conley* (2016) 63 Cal.4th 646, 657.) Such ameliorative changes include new discretionary power to strike sentencing enhancements. (See, e.g., *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-973; *People v. Chavez* (2018) 22 Cal.App.5th 663, 708; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507; see also *People v. Francis* (1969) 71 Cal.2d 66, 76.) In *Garcia*, Division Two of this court held that Senate Bill No. 1393 should be given retroactive effect to all cases not yet final on appeal. (*Garcia*, at pp. 971-973.)

Although we issued our remittitur prior to the effective date of the statute, this matter would not have been final for retroactivity purposes until the time expired to petition the United States Supreme Court for a writ of certiorari. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.) Bryant had 90 days from our Supreme Court's denial of review to file such a petition. (See U.S. Supreme Ct. Rules, rule 13(1).) Because this 90-day period extends beyond the effective date of Senate Bill No. 1393, this matter would not have been (and was not) final until after the statute went into effect. Bryant is therefore entitled to its benefit under *Estrada*.

We recognize that recalling the remittitur is an "extraordinary remedy" that normally "may be invoked only in cases of fraud or imposition practiced upon the court or upon the opposite party, or where the judgment was based on a mistake of fact or occurred through inadvertence." (*Southwestern Inv. Corp. v. City of L.A.* (1952) 38 Cal.2d 623, 629.) It may lie, however, where the defendant is entitled to habeas corpus relief. (See *People v. Mutch* (1971) 4 Cal.3d 389, 396.) Here, Bryant would be entitled to habeas corpus relief based on the retroactivity of Senate Bill No. 1393. Given

these circumstances, and the absence of any objection by the Attorney General, we may recall the remittitur and grant the requested relief. We reverse the relevant judgment and remand with directions to resentence Bryant, which must include consideration of the trial court's newly-enacted discretion to strike his prior serious felony enhancements.[3]

DISPOSITION

The judgment in Case No. SWF1500678 is affirmed. The judgment in Case No. INF1200501 is reversed with directions to resentence Bryant consistent with this opinion.

GUERRERO, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.

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3 This matter is distinguishable from *People v. Harris* (2018) 22 Cal.App.5th 657, where the court denied a motion to recall the remittitur to consider an analogous argument regarding new discretion to strike a sentencing enhancement. In *Harris*, the new statute took effect only *after* the defendant's case was final, including the time to petition for writ of certiorari from the United States Supreme Court. (*Id.* at p. 659.) The statute would therefore not have been retroactive in that case under normal application of the *Estrada* rule. Here, by contrast, Bryant's matter would not have been final on the effective date of the statute, and he is entitled to relief under the *Estrada* rule.